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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1996

IN RE: CHARLOTTE A. DORAND

CHARLOTTE A. DORAND

Petitioner,

v.

RIGHT UP YOUR ALLEY, INC.,
and ARLENE L. CREELY,

Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LINDSEY M. LADOUCEUR
Counsel of Record for Respondents
GWENDOLYN M. HANHART
Ladouceur and Ladouceur, L.L.C.
4330 Dumaine Street
New Orleans, Louisiana 70119
Telephone: (504) 488-8802

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RIGHT UP YOUR ALLEY, INC.,
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Right Up Your Alley, Inc. and Arlene L. Creely (collectively "Creely"), respectfully request that the Court deny the Petition for Writ of Certiorari filed by Charlotte A. Dorand ("Dorand") seeking review of a decision by the United States Court of Appeals for the Fifth Circuit.

BASIS FOR JURISDICTION

The judgment which Dorand asks this Court to review was rendered by the United States Court of Appeals for the Fifth Circuit on December 26, 1996. Dorand moved for a rehearing, which was denied by the appellate court on February 7, 1997. The jurisdiction of this Court to entertain Dorand's Petition for Writ of Certiorari is conferred by 28 U.S.C.A. § 1254(1) (West 1993).

STATEMENT OF THE CASE

This case concerns the nondischargeability of a debt pursuant to the provisions of the United States Bankruptcy Code, 11 U.S.C.A. § 523(a)(2)(A) (West 1993), which provides:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; . . . .

A. Statement of the Facts.

Creely originally sued Dorand in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, on February 27, 1992, for damages which she incurred as a result of the actions of Dorand in supplying Creely with accounting and related services. In her Petition, Creely alleged various causes of action to support her claim for damages, including a cause of action for fraud. Dorand failed to answer Creely's Petition for Damages, and a default judgment was ultimately rendered against her on April 7, 1992. The judgment provides, in pertinent part:

> This cause having come on this day on the Motion for Confirmation of Default Judgment filed by plaintiffs, Right Up Your Alley, Inc. and Arlene L. Creely, and the Court having considered the allegations of the Petition, the Motion and Memorandum of Plaintiffs, and the documentary evidence and oral testimony adduced at the hearing, and being of the opinion that facts and law preponderate in favor of the plaintiffs, and further finding that the defendant has made no appearance in this case since the entry of a preliminary default on March 27, 1992;
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be rendered in favor of plaintiffs and against defendant, Charley A. Dorand, on the allegations of breach of contract, negligence, conversion, payment of a thing not due, unfair and deceptive trade practices, fraud, and open account. . . .

The Judgment then awarded Creely actual damages in the amount of $11,700.57, general damages in the amount of $7,500.00, legal interest from date of judicial demand, all costs of the proceedings, including costs of execution and collection, and attorney's fees and costs in the amount of $4,505.15.

Once the judgment rendered by the state district court became definitive, Creely commenced collection efforts against Dorand to recover the amounts awarded in the judgment. She attempted to seize Dorand's funds on deposit in a local bank and an investment account. Creely also sought to examine Dorand as a judgment debtor. None of these efforts was successful. In fact, Dorand failed to appear for a judgment debtor examination; and a writ of attachment issued against her. She was arrested under the writ of attachment for her failure to appear at the judgment debtor rule, and, by agreement with her then-attorney, the judgment debtor rule was rescheduled.

On November 6, 1992, Dorand filed a Petition against Creely in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, seeking to nullify the judgment rendered against her.[1] Dorand asserted in her nullity action that service of process of Creely's lawsuit on her was improper, and that the judgment was not supported by adequate proof to make out a *prima facie* case. Dorand also sought and obtained a temporary restraining order preventing her appearance at the

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[1]Contrary to Dorand's assertion in her writ application that she "filed a motion to open the judgment and for leave to file an answer" (Pet. Writ Cert. p. 5), Louisiana law has no such procedure. Generally, an action to nullify a judgment is commenced by a separate lawsuit, instituted by a Petition, filed in an ordinary proceeding, requiring service of process of the Petition and the usual delays for responsive pleadings.

scheduled judgment debtor rule. Dorand's nullity action was transferred to the same division of the court which had heard Creely's case against Dorand.

At the hearing on Dorand's request for a preliminary injunction on February 18, 1993, the parties agreed to submit the entire matter for decision, including the merits of Dorand's nullity action. After hearing the evidence presented in support of Dorand's nullity action, the district court rendered judgment on March 24, 1993, dismissing her Petition, with prejudice, at her cost. The district judge further stated:

> . . . [T]he service by the Sheriff was proper, does constitute proper service and that the Judgment -- and I'll have to agree that there was some more testimony than I've ever seen in a default judgment presented and, consequently, I'm going to rule in favor on the Petition for Nullity, in favor of the appellees, Right Up Your Alley and Arlene L. Creely.

B. Proceedings in the Courts Below.

On March 26, 1993, two days after the state court rendered judgment dismissing Dorand's nullity action, Dorand filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Louisiana.

On June 7, 1993, Creely filed a Complaint to Determine Dischargeability of Debt, alleging that the judgment rendered in her favor against Dorand was nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523, since the state court judgment rendered against Dorand contained a finding of fraud. Creely

later filed a Motion for Summary Judgment on her dischargeability complaint, asserting that the state court judgment was entitled to collateral estoppel effect on the fraud issue. The bankruptcy judge denied Creely's Motion for Summary Judgment *ex parte*.

The dischargeability action was thereafter tried before the bankruptcy judge on January 19, 1995. On May 22, 1995, the bankruptcy court rendered judgment, and held that the state court judgment was not entitled to collateral estoppel effect. The bankruptcy court also held that Creely had not sustained her burden of proof to show that the debt was incurred by Dorand through fraudulent conduct.

Creely appealed the bankruptcy court judgment to the United States District Court for the Eastern District of Louisiana. On February 6, 1996, the district court initially affirmed the judgment of the bankruptcy court, both on the facts and on the collateral estoppel effect of the state court judgment. The district court initially reasoned that the state court judgment was not entitled to collateral estoppel effect on the fraud issue because, unlike fraud under 11 U.S.C. § 523, Louisiana substantive law of fraud did not require a showing of reliance. Creely moved for rehearing on this limited issue on February 23, 1996, arguing that, in fact, reliance was a required element of fraud under Louisiana substantive law.

The district court granted rehearing on March 25, 1996, and reversed its previous holding. The district court agreed that Louisiana substantive law, like 11 U.S.C. § 523, required a showing of reliance. The district court therefore found that the bankruptcy court was required to give the state court judgment collateral estoppel effect on the issue of fraud, such that the

state court judgment was nondischargeable in Dorand's Chapter 7 bankruptcy.

Dorand appealed the district court judgment to the United States Court of Appeals for the Fifth Circuit on April 22, 1996. The court of appeals affirmed on December 26, 1996, and denied rehearing on February 7, 1997. Dorand thereafter moved the court of appeals for a stay of mandate pending her writ application to this Court, and the court of appeals denied her request on March 5, 1997.

REASONS FOR DENYING THE WRIT

Sup. Ct. R. 10 sets out the guidelines for the consideration by the Court of a petition for writ of *certiorari*:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by

a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Therefore, the principal reason that this Court exercises its *certiorari* jurisdiction is to resolve conflicts among the courts of appeal and among the state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991).

Dorand's Petition for Writ of Certiorari makes no showing as to why this Court should grant review under the guidelines of Rule 10. She makes no showing that the decision of the Fifth Circuit Court of Appeals conflicts with decisions from other circuits, or with decisions of this Court. She also fails to show that the decision of the Fifth Circuit Court of

Appeals is *res nova,* so that this Court needs to decide the matter.

In fact, this Court has already passed on the primary issue involved in this case. In *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991), this Court specifically held that collateral estoppel principles do apply in discharge proceedings under 11 U.S.C. § 523(a). In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985) this Court held that, in deciding whether to give a state court judgment preclusive effect in a federal forum, federal courts must refer to the preclusion law of the state in which the judgment was rendered. The court of appeals properly relied on these rules of law.

Dorand's reasons why this Court should grant *certiorari* are merely her recitals of why she thinks the court of appeals erred in applying these rules of law to the case before it. She makes no showing that the court of appeals applied incorrect law. Her complaint is that the court of appeals misapplied the law, which, as Sup. Ct. R. 10 specifically provides, is rarely a basis for the grant of this Court's *certiorari* jurisdiction.

ARGUMENT

A. The Court of Appeals Properly Gave the State Court Judgment against Dorand Collateral Estoppel Effect in the Nondischargeability Action.

As a general rule, the doctrine of collateral estoppel protects litigants from the burden of relitigating an identical issue in another forum and promotes judicial economy by preventing inconsistent decisions and encouraging reliance on adjudications. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99

S. Ct. 645, 58 L. Ed. 2d 552 (1979); *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). Once an issue has been litigated, the resulting judgment is conclusive in any subsequent action between the parties. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

Since collateral estoppel serves important interests, these interests do not disappear simply because the subsequent proceeding arises in a bankruptcy context. Once a state court determines factual issues using standards identical to those employed under federal bankruptcy law, then collateral estoppel would bar relitigation of those issues in bankruptcy court. *Brown v. Felsen*, 422 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). In fact, this Court has specifically held that collateral estoppel principles do apply in discharge exception proceedings under 11 U.S.C. § 523(a). *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

In applying collateral estoppel principles to a state court judgment, federal courts must refer to the preclusion law of the state in which the judgment was rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985). If the law of the state in which the judgment was rendered would give the judgment preclusive effect, then federal courts must do so.

1. Louisiana Would Give the Judgment Preclusive Effect.

Until recently, Louisiana law did not recognize the common law concept of collateral estoppel. *Steptoe v. Lallie Kemp Hospital*, 93-1359 (La. 3/21/94); 634 So. 2d 331. Louisiana law recognized only *res judicata*, which was narrowly

applied. However, the Louisiana Legislature revised Louisiana's *res judicata* statute effective January 1, 1991. As revised, La. Rev. Stat. § 13:4231 provides, in pertinent part:

* * *

> (3) A judgment in favor of either the plaintiff or the defendant is conclusive in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat. Ann. § 13:4231 (West 1991). The Official Comments to the relatively new statute indicate that Subsection (3) changes Louisiana law by adopting the principle of issue preclusion.

Under Louisiana law, therefore, parties will be precluded from relitigating an issue decided in an earlier proceeding between them as long as (1) the issue was actually litigated, and (2) the determination of the issue was essential to the judgment rendered. *State Dep't of Social Services v. Matthews*, 615 So. 2d 1112 (La. Ct. App. 5th Cir. 1993). Since issue preclusion is a relatively new concept in Louisiana law, there is a sparsity of jurisprudence interpreting and applying it. However, jurisprudence interpreting Louisiana's *res judicata* statute prior to the 1991 revision provides guidance on the first prong of the test, since pre-1991 Louisiana law on *res judicata* also required that the matter be actually litigated. *Sewell v. Argonaut Ins. Co.*, 362 So. 2d 758 (La. 1978).

a. The Issue Must Be Actually Litigated.

A matter is actually litigated if it is put at issue in the pleadings and actually decided by the court in its judgment.

First Nat'l Bank of Gonzales v. Morton, 544 So. 2d 5 (La. Ct. App. 1st Cir.), *writ denied*, 550 So. 2d 654 (La. 1989). In order for a matter to be actually litigated, it must be demanded and become an object of the judgment. *Hogan v. Hogan*, 549 So. 2d 267 (La. 1989). When a judgment specifically disposes of a claim, the issue is considered actually litigated and determined. *Petty Realty Co. v. Continental Casualty Co.*, 47 So. 2d 446 (La. Ct. App. 2d Cir. 1950); *Franzone v. Merchants Trust and Savings Bank*, 427 So. 2d 600 (La. Ct. App. 5th Cir. 1983).

In the state court proceeding which resulted in the default judgment against Dorand, Creely's petition specifically asserted a cause of action for fraud. The judgment rendered by the state court contained a specific finding of fraud. It is therefore evident, on the face of the judgment itself, that the state court considered the allegations of fraud and rendered judgment against Dorand on that cause of action. Consequently, the issue of fraud was "actually litigated" under Louisiana law.

Further, Louisiana law makes no distinction between a judgment rendered by default and a judgment otherwise rendered. *Heine v. Muse*, 206 So. 2d 529 (La. Ct. App. 1st Cir. 1968); *Bowers v. Jones-Journet*, 316 So. 2d 18 (La. Ct. App. 4th Cir. 1975). This is especially true since, unlike some states, Louisiana law requires that a plaintiff, in confirming a default judgment, present competent evidence to support each element of her cause of action as fully as though each of the allegations in the petition was denied by the defendant. *Collins v. Estrade*, 638 So. 2d 275 (La. Ct. App. 5th Cir. 1994). That is, a plaintiff must make out a *prima facie* case for each of her claims. La. Code Civ. Proc. Ann. art. 1702A (West 1991).

b. The Determination Must Be Essential to the Judgment.

The state court judgment rendered against Dorand contained a specific finding of fraud.[2] The wording of the judgment is clear. The state court, therefore, obviously had to make a determination that fraud was proved. Dorand has argued that because Creely stated various causes of action in her petition, the judgment is not preclusive as to a finding of fraud, since the damages awarded could have been awarded on any of the other grounds asserted. This ignores the fact that, unlike a general judgment which merely recites that it finds in favor of a plaintiff and awards an amount in damages, the judgment against Dorand specifies that it is rendered on the fraud cause of action.

Dorand implored the district court and the court of appeals, and now implores this Court, to read the word "fraud" out of the judgment. She categorizes the judgment's inclusion of this word as "mere mention of the word."[3] To adopt Dorand's approach would contravene substantive law. According to the Louisiana Supreme Court, a "judgment should be so construed as to give effect to every word and part of it and the effects and consequences which follow from its terms whether expressed or implied." *In re Clover Ridge Planting & Mfg. Co., Inc.*, 194 La. 77, 93, 193 So. 468, 473 (1939). The judgment must be construed "according to the natural and legal import of the terms used." 194 La. at 94, 193 So. at 474. *See*

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[2]This fact contradicts Dorand's assertion in her writ application at p. 14 where she implies that the state court judgment was silent on the issue of fraud.

[3]*See* p. 9 of Dorand's Petition for Writ of Certiorari.

also Dodd v. Dodd, 568 So. 2d 1134 (La. Ct. App. 5th Cir. 1990).

Additionally, as the court of appeals noted in footnote 4 of its opinion, Dorand's assertion that a finding of fraud was not essential to the state court judgment is quite unusual. Usually, the question of whether the determination of an issue was essential to a judgment arises where a litigant asserts the preclusive effect of a fact or collateral issue that was raised in the original proceeding.[4] Here, Dorand challenges the entire claim itself. Dorand's logic is flawed; she cannot escape the basic fact that the state court judgment contains a finding of fraud.

Dorand also accuses the district court and the court of appeals of "speculation" in their attempts to analyze the various elements of damages awarded to Creely by the state court

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[4]*See, e.g., Oliver v. Department of Public Safety*, 95-1232 (La. Ct. App. 1st Cir. 2/23/96); 669 So. 2d 570, *writ denied*, 96-1041 (La. 5/31/96); 674 So. 2d 262 (finding that a stipulation between the parties of the distance between the premises applying for a liquor permit and a playground, in a suit by the premises owner to overturn the denial of a liquor permit, was preclusive in a second suit brought by the state to revoke the liquor permit); *Ebey v. Harvill*, 26,373 (La. Ct. App. 2d Cir. 12/7/94); 647 So. 2d 461 and *State Dep't of Social Services v. Matthews*, 615 So. 2d 1112 (La. Ct. App. 5th Cir. 1993) (both holding that a litigant's statement in a divorce suit regarding whether children had been born of a marriage was not preclusive in a subsequent suit to establish paternity, because a finding of parentage is not an essential element to the award of a judgment of divorce).

judgment to determine whether a finding of fraud was essential to the state court judgment.[5] However, the opinions of the district court and the court of appeals make it abundantly clear that it was Dorand herself who invited the district court and the court of appeals to engage in this analysis.[6] Dorand raised the issue of the damages awarded in an attempt to circumvent the clear wording of the state court judgment, which specified that damages were being awarded on the fraud cause of action asserted by Creely. It is Dorand, not the courts below, who

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[5]*See* p. 15 of Dorand's Petition for Writ of Certiorari, where she states, "The District Court's attempt to divine a finding of fraud from the nature of the damages was all the more inapposite. . .," and p. 16 where Dorand states, "A finding of preclusion on the issue of fraud required more than this kind of speculation."

[6]*See* Order and Reasons of the district court, at p. A-12 of the Appendix to Dorand's Petition for Writ of Certiorari, where the district court states, ". . . the appellee did raise a contention during oral argument that warrants some discussion. . . . Appellee contends that it is impossible to determine what amount of the damages awarded was based on fraud and what amount, if any, was based upon some other cause of action. . . ." *See also* the opinion of the court of appeals, at p. A-8 of the Appendix to Dorand's Petition for Writ of Certiorari, where the court of appeals states, "Dorland [sic] notes correctly, however, that under Louisiana law the state court could have awarded general damages for other causes of action (i.e. negligence) pleaded by Creely besides fraud alone. . . . Dorland [sic] also notes correctly that under Louisiana law, attorney's fees are recoverable for other causes of action besides fraud alone."

speculates when she argues that the damages awarded to Creely "could" have been awarded on some other ground. The district court's and the court of appeals' discussions on the issue of the damages awarded to Creely were only intended to point out that, of the causes of action asserted by Creely, fraud is the only one under Louisiana law which supports all of the various categories of damages awarded to Creely by the state court.[7]

Louisiana courts would clearly give the state court judgment preclusive effect in its finding of fraud. The issue of fraud was raised by Creely's pleadings, and the judgment specifically disposes of the fraud claim. Therefore, under Louisiana law, fraud was actually litigated and definitively determined. Since a determination of fraud is essential to a judgment which finds fraud, the issue of fraud was an essential part of the state court judgment.

2. The Result Would Be the Same Under Federal Collateral Estoppel Law.

Even if federal collateral estoppel law applied, the state court judgment at issue would satisfy the requirements under federal law. Federal collateral estoppel depends on three

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[7]Dorand also argues at p. 17 of her petition that the "state court might have had in mind, perhaps erroneously, that attorney's fees could be awarded for negligence or an aggravated breach of contract." What Dorand neglects to mention is that, under Louisiana law, a trial court judgment, including a default judgment, is presumed to be correct. *Greater New Orleans Homestead, F.S.B. v. David*, 95-986 (La. Ct. App. 5th Cir. 4/16/96); 673 So. 2d 1078. Dorand has proved nothing which rebuts that presumption.

elements: (1) the issue at stake must be identical to the issue in the prior proceeding; (2) the issue at stake must have been actually litigated in the prior action; and (3) the determination of the issue at stake must have been a necessary part of the judgment in the earlier proceeding. *Recoveredge v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995). The state court judgment meets these three criteria.

a. The Issue at Stake Must Be Identical.

Under Louisiana law, "fraud" is defined as a "misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or cause a loss or inconvenience to the other." La. Civ. Code. Ann. art. 1953 (West 1987). Further, under Louisiana law, the failure to perform an act in the future is not considered fraud. *Chrysler Credit Corp. v. Seemann*, 470 So. 2d 329 (La. Ct. App. 5th Cir. 1985).[8] Additionally, reliance is an essential element to recovery for fraud. *Abbott v. Equity Group, Inc.*, 2 F.3d 613 (5th Cir. 1993); *LaCroix v. Recknagle*, 230 La. 842, 89 So. 2d 363 (1956); *Buxton v. McKendrick*, 233 La. 62, 64 So. 2d 844 (1953).

To establish the elements of actual fraud under 11 U.S.C. § 523(a)(2)(A) of the Bankruptcy Code, a creditor must prove (1) that the debtor made representations, (2) which the

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[8]This principle is in accord with bankruptcy jurisprudence, which holds that the mere breach of a contract does not imply the existence of fraud. *In re Zachary*, 147 B.R. 881 (Bankr. N.D. Tex. 1992); *In re Guy*, 101 B.R. 961 (Bankr. N.D. Ind. 1988); *In re Boese*, 8 B.R. 660 (Bankr. D. N.D. 1981).

debtor knew were false, (3) made with the intention and purpose to deceive the creditor, (4) that the creditor relied on the representations, and (5) that the creditor sustained losses as a proximate result of the representations. To establish that a debt is for money obtained by "false representation or false pretense" under 11 U.S.C. § 523(a)(2)(A), the debtor's representation must have been (1) a knowing and fraudulent falsehood, (2) describing past or current facts, (3) that was relied on by the other party. *Recoveredge L.P. v. Pentecost*, 44 F.3d 1284, 1292-93 (5th Cir. 1995), *quoting Allison v. Roberts*, 960 F.2d 481, 483 (5th Cir. 1992).

The district court and the court of appeals correctly held that the elements of fraud under Louisiana law are equivalent to the elements required to except a debt from discharge under 11 U.S.C. § 523(a)(2)(A). *See Newport, Ltd. v. Sears Roebuck & Co.*, 6 F.3d 1058 (5th Cir. 1993); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914, 109 S. Ct. 3236 (1989) (applying Louisiana law). The burden of proof of fraud is also the same under Louisiana law and federal bankruptcy law. Article 1957 of the Louisiana Civil Code provides, "Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence." La. Civ. Code. Ann. art. 1957 (West 1987). Likewise, in a bankruptcy nondischargeability proceeding, fraud need only be proved by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Consequently, the finding of fraud by the state court is a finding based upon facts which are consistent with the facts necessary to sustain an exception to discharge under 11 U.S.C. § 523(a)(2)(A).

On the face of the state court judgment, therefore, Creely proved the elements necessary to sustain the basis of her nondischargeability action under federal bankruptcy law.

b. The Issue At Stake Must Be Actually Litigated.

When an issue is properly raised by the pleadings or otherwise, is submitted for determination, and is determined, the issue has been actually litigated for collateral estoppel purposes. *In re Garner*, 56 F.3d 677, 680 (5th Cir. 1995). Creely alleged fraud in her Petition; she submitted the fraud issue to the state court judge for determination; and the state court judgment disposed of the issue by specifically awarding Creely damages for fraud. The state court judgment therefore meets the "actually litigated" requirement for federal collateral estoppel.

Further, the fact that the state court judgment was rendered by default does not diminish its preclusive effect under federal collateral estoppel principles. This is especially the case under Louisiana law, since a plaintiff must establish a *prima facie* case even when obtaining a default judgment against the defendant.

A defendant is entitled to her day in court, but not necessarily to the actual presentation of her case. All that is required is that the defendant be duly cited to appear and afforded an opportunity to be heard. *Mitchell v. National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), *citing Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163 (6th Cir. 1941). Dorand had every opportunity in the state court proceeding to either appear and contest the case or appeal the judgment. She chose not to do so. She did, however, unsuccessfully attempt

to have the judgment nullified. Since collateral estoppel lies for any issue duly pleaded in and legitimately a part of the action in which the default was suffered, actual contest is unnecessary as long as the issue was necessary to the determination of the judgment, whether contested or not. *In re Cohen*, 92 B.R. 54 (Bankr. S.D. N.Y. 1988).

c. The Issue at Stake Must Be a Necessary Part of the Judgment.

Creely will not reiterate the arguments she has made above which address this issue under the Louisiana requirements for collateral estoppel, but the same arguments apply. The state court judgment specifically says that the trial court found in favor of Creely on the fraud cause of action. Therefore, the state court made a factual determination that fraud had been committed by Dorand. It seems abundantly clear that a determination of fraud by the trial court was essential to the judgment which specifically finds fraud.

In addition to meeting the requirements for collateral estoppel under Louisiana state law, the state court judgment given preclusive effect by the courts below also meets the requirements for preclusive effect under federal law.

B. The Protections Afforded Honest Debtors by Congress Have Not Been Eroded by the District Court and the Court of Appeals.

While Creely agrees that the purpose of the Bankruptcy Code is to give debtors "a new opportunity in life and a clear field for future effort," *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), a debtor has no constitutional or fundamental right to a discharge in bankruptcy. *United States v. Kras*, 409 U.S.

434 (1973). This Court has held that the "fresh start" policy afforded debtors under the Bankruptcy Code is limited to the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 654, 659-60, 112 L. Ed. 2d 755 (1991).

Dorand has been found to be dishonest by a state court of Louisiana, her own home state. Under Louisiana law, just like federal law, fraud is never presumed. *Bass v. Coupel*, 93-1270 (La. Ct. App. 1st Cir. 6/23/95); 671 So. 2d 344, *writ denied*, 95-3094 (La. 3/15/96); 669 So. 2d 426. Any threat which Dorand perceives as a result of the lower courts' decisions in this case is only a threat to dishonest debtors like Dorand. Neither the district court's nor the court of appeals' decisions in this case will adversely impact the honest debtor.

Dorand implies that this case, as well as *Fielder v. King*, 103 F.3d 17 (5th Cir. 1997), in some way show that the protection of debtors in bankruptcy is being eroded in the Fifth Circuit Court of Appeals. However, Dorand cites no cases from other circuits to show that the Fifth Circuit Court of Appeals decided this case or *Fielder* any differently than other circuits would have. Dorand also incorrectly implies that the holding in *Fielder* is inconsistent with the holding in this case.

The debtor in *Fielder* invoked the collateral estoppel effect of a state court judgment which was *silent* on the issue of fraud. Although the jury had originally awarded the plaintiffs actual damages and punitive damages, the trial court, in response to a motion for new trial by the debtor, substituted a new judgment that reduced the award to contract damages alone, plus interest. The state court judgment, however, did not reflect the factual or legal basis for the court's elimination of the fraud damages. The court of appeals found that the elimination of the fraud damages by the state court could not be construed

"as a specific factual finding regarding the federal law dischargeability issue."

Unlike the judgment in *Fielder*, the state court judgment rendered against Dorand contained a specific finding of fraud. The judgment is not "vague," as Dorand argues. It uses the word "fraud," which is easily defined under both Louisiana law and federal law.

Both the court of appeals' holding in *Fielder* and its holding in this case are therefore consistent. In *Fielder*, the state court judgment did not contain a finding on the fraud issue. Therefore, the judgment did not have collateral estoppel effect; and the creditors were free to litigate the issue of the debtor's fraud in bankruptcy court. In this case, the state court judgment did contain a finding on the fraud issue in Creely's favor; therefore, Dorand was not free to relitigate the issue of her fraud in bankruptcy court.

CONCLUSION

Dorand is not entitled to this Court's exercise of its *certiorari* jurisdiction. Dorand has failed to show that the holdings of the lower courts are contrary to decisions from other circuits or from this Court. In fact, the decisions of the district court and the court of appeals are consistent with well-settled principles of collateral estoppel and issue preclusion which have emanated from this Court.

The state court judgment rendered against Dorand evidences on its face that the issue of fraud was actually litigated and determined. Louisiana courts would give the state court judgment preclusive effect on the fraud issue; and the bankruptcy court was thus required to do so.

For these reasons, Dorand's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ARLENE L. CREELY and
RIGHT UP YOUR ALLEY, INC.

Lindsey M. Ladouceur
LINDSEY M. LADOUCEUR
Counsel of Record for Respondents
GWENDOLYN M. HANHART
Ladouceur and Ladouceur, L.L.C.
4330 Dumaine Street
New Orleans, Louisiana 70119
Telephone: (504) 488-8802